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AMCOM EXPRESS INDUSTRY DAY January 9, 2013

Organizational Conflicts of Interest (OCIs)

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I AM NOT YOUR ATTORNEY!!! SEEK LEGAL ADVICE FROM
YOUR LEGAL COUNSEL - VIEWS EXPRESSED HERE ARE
THOSE OF THE PRESENTER AND ARE NOT OFFICIAL DOD
POSITIONS

BRIEFING PURPOSE

- Raise OCIs as an issue on your radar
- Bring to your attention the OCI related requirements set forth in the EXPRESS BPA and highlight some key points
- Emphasize that contractor's EXPRESS related efforts may lead to future acquisitions, e.g., production contracts, for which contractor may have an OCI due to its EXPRESS efforts
- Briefing not intended as an OCI primer

OCI FAR DEFINITION

Pursuant to FAR 2.101, an OCI “means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.”

ALTERNATE OCI “DEFINITION”

An “OCI arises when a contractor possesses (1) an economic incentive that renders it unable, or potentially unable to provide impartial assistance or advice; or (2) an unfair competitive advantage in obtaining a contract as the result of access to nonpublic information about a competitor or a procurement.” [A *Guide to Identifying and Mitigating Organizational Conflicts of Interest* by Keith

WHY AVOIDING OCIs IMPORTANT?

- Maintain trust of the American taxpayer
- Maintain confidence in the Government Procurement System
- Keep competition fair
- Avoid overturn of an award decision

OCI GOVERNING AUTHORITIES

- FAR Subpart 9.5 (see also DFARS 209.5 and AFARS 5109.5)
 - Sets forth responsibilities, general rules and procedures for identifying, evaluating and resolving OCIs.
 - Per FAR 9.502(c), an OCI may result when factors create an actual or potential conflict of interest on an instant contract, or when the nature of the work to be performed on the instant contract creates an actual or potential conflict of interest on a future acquisition. In the latter case, some restrictions on future activities of the contractor may be required.
- ✂ BPA – Paragraph 47, Organizational Conflict of Interest
- ✂ Government Accountability Office/Court of Federal Claims case law on OCIs

THREE TYPES OF OCIs

- IMPAIRED OBJECTIVITY
- BIASED GROUND RULES
- UNEQUAL ACCESS TO INFORMATION

IMPAIRED OBJECTIVITY OCI

- These occur when a contractor's work under one Government contract could entail evaluating itself or its affiliates either through an assessment of performance under another contract or an evaluation of proposals. Such OCIs may also arise where a contractor's outside business relationships create an economic incentive to provide biased advice under a Government contract. FAR 9.505-3.
- The concern is that the firm's ability to render impartial advice to the Government could appear to be undermined by its relationship with the entity whose work product is being

BIASED GROUND RULES

OCI

- These occur when a firm, as part of its performance of a Government contract, has in some sense set the ground rules for the competition for another Government contract by, for example, writing the statement of work or the specifications.
- Primary concern is that the firm could skew the competition, whether intentionally or not, in favor of itself. FAR 9.505-1, 9.505-2.
- These situations may also involve a concern that the firm, by virtue of its special knowledge of the agency's future requirements, would have an unfair advantage in the competition of those requirements.

UNEQUAL ACCESS TO INFO OCI

- These occur when a firm has access to nonpublic information (proprietary information belonging to other contractors or source selection information) as part of its performance of a Government contract and where that information may provide the firm with an unfair competitive advantage in a later competition for a Government contract. FAR 9.505.
- An example is requiring a contractor to handle proprietary data belonging to other contractors without providing safeguards to assure against misuse or improper disclosure of information.
- In such cases, the primary concern is minimizing the risk that a firm will gain an unfair competitive advantage over other

PROPRIETARY INFORMATION

- BPA, paragraph 47(h) -- Use of other companies' proprietary data shall be necessary for contract performance. When the contractor has entered into a direct license agreement with the owner of the proprietary data, the contractor agrees to provide a copy of the agreement to the KO prior to receiving the proprietary data from the Government. If KO finds written agreement is not adequate, the Government has the right to withhold access to the proprietary data.
- FAR 9.505-4(b) -- A contractor that gains access to proprietary information of other companies in performing advisory and assistance services for the Government must agree with the other companies to protect their information from unauthorized use or disclosure for as long as it remains proprietary and refrain from using the information for any purpose other than that for which it

OCI?



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BPA TERMS/AVOIDANCE

- BPA, paragraph 47(b) - The parties hereto recognize that performance of such services creates potential OCIs as addressed in FAR Subpart 9.5.
- BPA, paragraph 47(c) - Contractor shall identify any possible OCIs to KO or state in writing (certify) that to the best of the contractor's knowledge and belief no OCIs exist

BPA TERMS/AVOIDANCE

BPA, paragraph 47(d) - Whenever, in the performance of this BPA, the contractor prepares, directly contributes to, participates in, or provides recommendations or advice related to the development of specifications, work statements, estimates, data or other information for hardware/software items, the contractor agrees that it shall not enter into any contract either as a prime, a subcontractor at any tier, or a consultant to furnish said items or components thereof during the life of this BPA or through the initial production contract, whichever is longer.

BPA TERMS/AVOIDANCE

BPA, paragraph 47(e) - The contractor also agrees that it shall not enter into any contract with the item supplier to provide any support, analysis or consulting services. This prohibition will apply through completion of the final task order issued under this BPA.

BPA TERMS/AVOIDANCE

BPA, paragraph 47(f) - During the performance of this BPA through completion of the final task order, the contractor, its subcontractors at any tier, and consultants are prohibited from analyzing, assessing, and/or making recommendations on any effort/documentation, hardware, software, or components which they produced in any capacity as a prime contractor, a subcontractor at any tier, or

BPA TERMS/AVOIDANCE

BPA, paragraph 47(i) - For the purpose of this clause, the term "contractor" means the contractor, including any company or entity of which it is a part (i.e., parent company), its subsidiaries, divisions, affiliates, any joint venture involving the contractor, and any entity which the contractor or any successor or assignee of the contractor uses as a prime contractor, subcontractor, or consultant to either the prime contractor or a subcontractor under this contract.

BPA TERMS/AVOIDANCE

BPA, paragraph 47(j) - The provisions of this clause are fully applicable to all team members and subcontractors utilized by the contractor and this clause shall be included in all subcontracts, or other teaming arrangements the contractor enters into to support, either directly or indirectly, this contract.

OCI CONSEQUENCES

- While FAR anticipates mitigation under appropriate circumstances, not all OCIs can be successfully mitigated.
- BPA, paragraph 47(k) - no form of "business insulation" technique to avoid, evade or substitute for the restrictions set out herein shall be permitted except in the absolute discretion of the Government.
- What constitutes a successful mitigation strategy is different in each case and must be evaluated on a fact specific basis.
- Final decision will be made by the cognizant PCO, e.g., PCO for system/item.